UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAKIL S.P.A., Plaintiff, - against - AGRIMPEX CO. LTD., Defendant.	08 CIV 5613 (DC) **ECF CASE**

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S MOTION TO VACATE MARITIME ATTACHMENT

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PRELIMINARY STATEMENT

Defendant, AGRIMPEX CO. LTD. (hereinafter "Defendant" or "Agrimpex") by and through its undersigned counsel, Lennon, Murphy & Lennon, LLC, respectfully submits this Memorandum of Law in Support of its Motion to Vacate the Maritime Attachment issued pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule B"). Plaintiff also respectfully submits the accompanying declaration of P.G. Philippas, (Philippas Decl.), director of Agrimpex. As Plaintiff, JAKIL S.P.A. (hereinafter "Plaintiff" or "Jakil") has failed to allege a recognizable claim in admiralty as required under Rule B, Defendant's motion should be granted and the attachment vacated for lack of subject matter jurisdiction and Plaintiff's Verified Complaint should be dismissed in its entirety.

FACTS

Jakil was, and still is, a foreign business entity duly organized and existing pursuant to the laws of Italy. Agrimpex was, and still is, a foreign corporation, with its principal place of business located at 1138 High Road, Whetstone, London N20 0RA, United Kingdom.

The underlying dispute arises from Jakil's claim that Agrimpex has breached five separate sale contracts. *See Plaintiff's Verified Complaint, at ¶ 7.* However, the contracts are not directly and intimately related to the operation of a vessel or its navigation, i.e., they are not maritime in nature.

Specifically, Jakil and Agrimpex entered into five separate purchase and sale contracts ("the sales contracts") by which Jakil contracted to purchase 20,000 metric tons (total 100,000 metric tons), 10% more or less at seller's option, of Sudanese durra feterita from Agrimpex. The first contract (no. DFS/56207) was dated June 27, 2007, the second contract (no. DFS/56307)

was dated July 3, 2007, the third contract (no. DFS/56407) was dated July 10, 2007, the fourth contract (no. DFS/56607) was dated July 17, 2007, and the fifth contract (no. DFS/56907) was dated July 27, 2007. *See Sales Contracts annexed to the Declaration of Anne C. LeVasseur as Exhibits "1", "2", "3", "4" and "5" respectively.* The sales contract was a contract of carriage. Agrimpex is not a vessel owner or a transporter of goods. Agrimpex then entered into a separate contract with a third party for shipment of the cargo.

Due to supply and production problems from its suppliers, Agrimpex could not provide the full cargo of durra feterita as provided for in the sales contracts. Disputes arose between Jakil and Agrimpex under the sales contracts. The parties attempted to negotiate a resolution of the matter but were unable to resolve their disputes.

The sale contracts incorporate, by reference, provisions which govern arbitration of claims arising under the sales contracts. All five sales contracts provide that additional terms and conditions not found in the sales contracts are governed by "GAFTA contract 61 including the Arbitration Rule form No. 125". *See Exhibits 1-5 to LeVasseur Decl.; See Philippas Decl. at ¶ 9.*. GAFTA is an acronym for the Grain and Feed Trade Association and provides arbitration services to parties adopting GAFTA's standard form contracts. Jakil has commenced arbitration proceedings under the sales contract by nominating an arbitrator. *See Plaintiff's Verified Complaint, at ¶ 11.*

On June 20, 2008, Jakil applied for and obtained an ex parte maritime attachment order under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. On or about August 4, 2008, Agrimpex received notice of lawsuit and maritime attachment from Jakil's counsel, Chalos & Co, advising Agrimpex that

funds in the amount of $1,829,901.45 had been attached at BNP Paribas allegedly belonging to Agrimpex. Agrimpex denies that these funds being held at BNP Paribas belong to it.

Agrimpex makes the instant motion to vacate the attachment as Jakil has failed to allege a *prima facie* maritime claim as required under Rule B.

ARGUMENT

POINT I

IT IS PLAINTIFF'S BURDEN TO PROVE WHY THE ATTACHMENT SHOULD NOT BE VACATED

A Plaintiff that has obtained and an ex parte Rule B attachment order shoulders the burden at the post-attachment hearing to prove *inter alia* that "it has a valid prima facie admiralty claim against the defendant." *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty. Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006). Supplemental Admiralty Rule E(4)(f) of the Federal Rules of Civil Procedure provides:

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.

In such cases, Local Admiralty and Maritime Rule E.1 provides:

> The adversary proceeding following arrest or attachment or garnishment that is called for in Supplemental Rule E(4)(f) shall be conducted by a judicial officer within three court days, unless otherwise ordered.

At the Rule E(4)(f) hearing, a defendant or a party claiming an interest in the attached property may challenge "the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings." *Aqua Stoli,* 384 F. Supp. 2d. at 728 (quoting Supp. R. Fed. Civ. P. advisory committee's notes). To satisfy the requirement of Rule B, the Plaintiff has the

burden to show that: (a) it has a prima facie valid maritime claim; (b) the named defendant cannot be found within the district; (c) the named defendant's property was within the district; and (d) no other statutory or maritime law bar to the attachment. *Aqua Stoli,* 460 F. 3d at 445.

It is the plaintiff's burden to prove that the attachment is proper. The Second Circuit Court of Appeals commented on Rule E(4)(f) in *Aqua Stoli* and established the following standard:

> [A] district court must vacate an attachment if the plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rules B and E. We also believe vacatur is appropriate in other limited circumstances. While, as we have noted, the exact scope of a district court's vacatur power is not before us, we believe that a district court may vacate the attachment if the defendant shows at the Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain in personam jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise. n5.
>
> Rule E(4)(f) clearly places the burden on the plaintiff to show that an attachment was properly ordered and complied with the requirements of Rule B and E. Although Rule E does not explicitly mention a district court's equitable power to vacate an attachment or who bears such a burden, former Local Rule 12 required the defendant to establish any equitable grounds for vacatur, and we believe that defendants still bear that burden under the Supplemental Rules.

Aqua Stoli, 460 F.3d at 445.

POINT II

THE ATTACHMENT SHOULD BE VACATED AS THERE IS NO ADMIRALTY JURISDICTION

A. Rule B maritime attachment can be invoked only when admiralty jurisdiction exists over a maritime claim.

Rule B maritime attachment can be invoked only when a plaintiff files a verified complaint sufficient to make a prima facie showing that the plaintiff has a valid maritime claim against the defendant in the amount sued for. *See Maritima Petroleo E Engenharia Ltda. v. Ocean Rig 1 AS and Ocean Rig 2 AS,* 78 F. Supp. 2d 162, 166 (S.D.N.Y. 1999) *citing* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, §21-2 at 471 (2d ed. 1999). Thus, a plaintiff seeking a maritime attachment order under Rule B must properly allege a maritime claim. "The absence of maritime jurisdiction would prove fatal to [a] plaintiff's attachment." *Maritime Petroleo*, 78 F. Supp. at 166. As will be shown herein, Jakil has failed to make a prima facie showing that it has a valid maritime claim.

B. The Plaintiff has the burden of establishing the federal court's subject matter jurisdiction over its claims.

The Plaintiff bears the burden of establishing that the federal court has subject matter jurisdiction over its claims. As shown above, in Rule B cases a plaintiff necessarily relies on the admiralty jurisdiction of the federal court. Therefore, the plaintiff bears the burden of showing that it has a maritime claim. Furthermore, the subject matter jurisdiction of the court must be affirmatively proved. The court may not infer subject matter jurisdiction. *See Shipping Financial Serv. Corp. v. Drakos,* 140 F.3d 129, 131 (2d. Cir. 1998)(stating that "when the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.") Thus, Jakil cannot merely allege its claim is maritime, it must <u>prove</u> it.

Jakil alleges that as a result of Agrimpex' failure to deliver the entire quantity of cargo as provided for in the sales contracts, Agrimpex has breached the sales contract. *See Plaintiff's Verified Complaint at* ¶ ¶ 7, 8. A breach of a sales contract is not a maritime claim. *See See*

Aston Agro-Industrial Ag v. Star Grain Ltd., 2006 U.S. Dist. 91636 (S.D.N.Y. December 20, 2006). Jakil has alleged in ¶1 of its Verified Complaint that its claim falls within the admiralty jurisdiction of the court. Jakil's claim under the sales contract is not maritime in nature and Jakil is not claiming damages under any alleged maritime provisions of the sales contract. Rather, Jakil is claiming for general damages which arose from Agrimpex' alleged breach of the production requirements of the sales contract.

C. Admiralty jurisdiction does not extend to contracts in which the maritime aspects are incidental to the purpose of the contract.

Admiralty jurisdiction is provided for under 28 U.S.C. §1333(1) which affords district courts original jurisdiction over "any civil case of admiralty or maritime jurisdiction." While the courts have found the boundaries of admiralty jurisdiction as based on maritime contracts difficult to draw, "[t]he United States Supreme Court has held that the 'true criterion' and 'crucial consideration' for determining admiralty jurisdiction is the 'nature and subject matter of the contract at issue.'" *See Sea Transport Contractors, Ltd. v. Industries Chemique Du Senegal,* 411 F. Supp. 2d 386, 393 (2006); *see also Kossick v. United Fruit CO*, 365 U.S. 731 (1961).

Furthermore, in general the "subject matter of the contract must be directly and intimately related to the operation of a vessel and navigation; it is not enough that the contract relate in some preliminary (shore side) manner to maritime affairs." 1 *Shoenbaum* § 3010 at 111.

"Admiralty jurisdiction does not attach to a contract merely because the services to be performed under the contract have reference to a ship, or to its business, or that the ship is the object of such services or that it has reference to navigable waters." *See Intercontinental Contractors, Inc. v. Canadian Maritime Carriers, Ltd. and Maritime Port Services Division of Maritime Group (Canada) Inc.*, 1986 U.S. Dist. LEXIS 25872 at *2 (E.D.Penn. May 6, 1986) *citing* 1 *Benedict on Admiralty* § 183 (7th ed. 1985).

"In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry, for the very basis of the constitutional grant of admiralty jurisdiction was to ensure a national uniformity of approach to world shipping." 1-XII *Benedict on Admiralty* § 182 (2005).

There are exceptions to the general rule that admiralty jurisdiction arises only when the subject of the contract is purely maritime in nature. In *Folksamerica Reinsurance v. Clean Water of NY, Inc.*, 413 F.3d 307, 314 (2d Cir. 2005) the Second Circuit held that the court can exercise admiralty jurisdiction where the non-maritime provisions of a contract are "incidental to" the maritime provisions. *Id.* at 314-315. The *Folksamerica* Court held that when deciding whether a 'mixed contract' falls into this exception, the court must determine whether the contract's principal objective is the accomplishment of a maritime transaction, not whether the non-maritime portions of the contract are 'merely incidental' to the maritime ones. *Id.*

Another exception applies to "mixed contracts", which contain maritime and non-maritime provisions. If a claim arises from a breach of the maritime provisions, which are severable from the non-maritime provisions, the court can properly exercise admiralty jurisdiction. *Id.* However, mixed contracts do not usually fall within the Court's admiralty jurisdiction. *See Maritima Petroleo e Engenhaira Ltd. v. Ocean Rig 1A,* 78 F. Supp. 2d 162 (S.D.N.Y. October 6 1999)(granting defendant's motion to dismiss plaintiff's complaint and vacating maritime attachment because contract claim was too far removed from navigation or maritime commerce to justify the exercise of federal maritime jurisdiction.)

Neither exception applies to the instant case. First, the primary purpose of the sales contracts was clearly not maritime. Rather, it was the purchase and sale of land based goods, not

the transportation of such goods by sea. A contract does not become subject to maritime jurisdiction simply because there is a sale of goods which will be transported by sea. *See Lucky-Goldstar Int'l (America) Inc. v. Phibro Energy International Ltd.*, 985 F.2d 59 (5^{th} Cir. 1992)("it is well-settled that a sale of goods by itself would not be 'maritime' in nature merely because the seller agrees to ship the goods by sea to the buyer.") Moreover, Jakil's claim does not arise from an alleged breach of any alleged maritime provisions of the sales contracts.

New York courts have recently addressed the issue of whether the breach of a sales contract supports a Rule B attachment. In *Aston Agro-Industrial AG v. Star Grain Ltd.*, 2006 U.S. Dist. LEXIS 91636 (S.D.N.Y. Dec. 20, 2006) Judge Daniels vacated a maritime attachment holding that the Court lacked admiralty jurisdiction over contracts for the sale of Russian Wheat. Judge Daniels held:

> [T]he contracts at issue were not maritime because their primary objective was not the transportation of goods by sea. Instead, their primary objective was, undoubtedly, the sale of wheat. That the wheat was transported on a ship does not make the contracts maritime contracts any more than it would make them aviation contracts had the wheat been shipped via airplane. Nor were they contracts between a seller and a shipper. In fact, Aston entered into two separate charter parties to accomplish the shipment of the wheat, and it was the primary maritime objective of those contracts to transport the wheat by sea. Thus, the charter parties between the seller and the shipper . . . are maritime contracts. . . The contracts for the sale of wheat are not.

Aston-Agro Industrial AG v. Star Grain, 2006 U.S. Dist LEXIS 91636 at 9-10.

Judge Lynch reached a similar result in *Shanghai Simon Import and Export v. Exfin (India) Mineral Ore Co., PVT. LTD.*, Docket No. 06 cv 4711 (GEL)(S.D.N.Y. Oct. 5, 2006)(Transcript annexed hereto as Exhibit 1). *Shanghai Simon Import and Export* involved a contract for the sale of iron ore from plaintiff, a Chinese company, to Defendant, an Indian company. Plaintiff's claim arose from defendant's alleged failure to timely deliver the entire

quantity of cargo as required by the contract. Judge Lynch noted that the contract at issue contained certain provisions which specifically related to a requirement that the goods be shipped by sea. *Id. at 3.* Judge Lynch also considered the fact that the contract at issue contained provisions that related to nominating a vessel, demurrage and laytime calculations, and different conditions that would apply to ocean carriage. *Id.* However, Judge Lynch held that the contract at issue was not a contract for maritime transportation, rather, it was a sales contract which also included maritime provisions requiring the cargo to be shipped by sea and specifying the conditions for shipment. *Id. at 4-5.* "[T]he contract is not a contract for maritime transportation; rather, the contract contemplates that the defendant will enter such a contract with a suitable ship owner." *Id.* at 10. Judge Lynch further held:

> [B]oth common sense and long-established case law suggests that this is a nonmaritime dispute between a purchaser and a seller over the alleged failure to deliver purchased goods.
>
> ** *
>
> The Fifth Circuit's decision in *Lucky Gold Star v. Phibro Energy*, 958 F.2d 58 (1992), states the long-established law on this subject, noting that a contract for a land-based sale of goods is not maritime merely because the seller agrees to ship the goods by sea to the buyer. Citing its earlier decision in *Loredo Offshore Contractors v. Hunt Oil Company*, 754 F.2d 1223, 1231-32 (Fifth Circuit 1985), the court noted that "It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not without more bring nonmaritime obligations within the pale of admiralty law.
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> ***
>
> The purchase of goods by a buyer in one country from a seller in another, with a proviso that the goods are to be sent by sea, and with some incidental provisions bearing on the nature of that shipment, the alleged breach here was a breach wholly of the sale of goods provisions of the contract, not of its incidental maritime aspects, or indeed, of any transportation aspects at all. There is thus no basis in this case for maritime jurisdiction.

Shanghai Simon Import and Export v. Exfin (India) Mineral Ore Co., PVT. LTD., Docket No. 06 cv 4711 (GEL) at 12-13.

Jakil may rely on Judge Preska's recent decision in *Noble Resources v. Yugtranzitservix and Silverstone,* Docket No. 08 cv 3876 (LAP)(S.D.N.Y. July 23, 2008)(Transcript annexed hereto as Exhibit 2). In that case, Judge Preska upheld plaintiff's maritime attachment despite challenges raised by defendants that the contract at issue was not maritime in nature and not subject to the maritime jurisdiction of this Court. Judge Preska held, "To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty jurisdiction." *Id.*

In determining whether plaintiff's claim was maritime in nature, Judge Preska looked at the contract at issue and held that maritime transportation was integral to the agreement. This is because the contract at issue set out in great detail the dates open for loading in the specified port, set out in detail how the loading of the vessel was to be effected, and provided that the vessel should be confirmed or rejected by the sellers in writing, and in this case, the sellers had rejected the first three vessel that were nominated. Accordingly, the underlying contract touched upon the "business of maritime commerce." *Id. at 3-4.* Moreover, Judge Preska held that the Court was required to look at the nature of the dispute between the parties. In that case, Judge Preska held that the dispute "touched upon maritime commerce" for the following reasons:

> As set out in plaintiff's claim submissions in the arbitration, and perhaps more importantly as reflected in the award, the dispute centered on two issues. First, the default by YTS in failing to provide a berth for the vessel after she had tendered her notice of readiness and refusal to load the vessel constituting default under the contract. And, secondly, a request for wasted vessel costs, that is, the costs incurred by the vessel following tendering of her notice of readiness.

> As set out in the award damages were awarded for both these items and indeed there was a lengthy discussion in Section 6 of the award about the wasted costs incurred on behalf the vessel's lack of use because of defendant YTS's default. The waster vessel expenses included bunkering costs, port and survey costs, and hire payments, all clearly within the maritime jurisdiction.
>
> For all those reasons, I find that the contract and dispute at issue fall within the Court's maritime jurisdiction.

Noble Resources v. Yugtranzitservis and Silverstone, Docket No. 08 cv 3876 (LAP) *at 3-4.* *Noble Resources* is readily distinguishable from the instant case. The *Noble Shipping* plaintiff alleged disputes arising from the maritime portions of the contract. Moreover, the Arbitration Award issued in Noble's favor in the arbitration related solely to the maritime portions of the contract and the maritime nature of the contract between the parties was highlighted in the Arbitration Award issued in Noble's favor. The instant case is distinguishable because here, unlike in *Noble*, the disputes do not arise out of any maritime provisions of the sales contract and Jakil's arbitration claims relate solely to damages related to Agrimpex' alleged failure to deliver the quantity of goods provided for in the sales contract.

Additionally, Jakil has alleged that "disputes arising out of the agreement are to be resolved by way of maritime arbitration proceedings held before arbitrators who are expert in maritime matters. JAKIL has appointed its arbitrator and demanded AGRIMPEX to proceed to arbitration with this matter." *See Plaintiff's Verified Complaint, at ¶ 11.* Contrary to Jakil's allegation, the sales contracts clearly state as follows:

> All other terms, conditions and rules not in contradiction with the above, as per GAFTA contract 61, including the Arbitration Rule form No. 125 (of which the parties admit that they have knowledge and notice) apply to this contract, the details given shall be taken as having been written into such form in the appropriate place.

As noted *supra,* GAFTA is the Grain and Feed Trade Association, which is a trade body. The arbitration is a commodity dispute which simply includes shipping as a minor element. *See Philippas Decl. at ¶ 14.* Accordingly, it is evident that the sales contracts are not subject to maritime arbitration proceedings and are not to be held before arbitrators who are experts in maritime matters.

On or about June 10, 2008, Jakil sent correspondence to Agrimpex through Studio Legale Associato notifying it that it pursuing a claim in arbitration against it under the Rules of GAFTA. *See Philippas Decl. at ¶ 10.* Jakil further notified Agrimpex that it was nominating Mr. Cyril Carr as an arbitrator in accordance with GAFTA 125 Rule 3. *A copy of this correspondence is annexed to the Philippas Decl. as Exhibit 1.* This correspondence notes that Mr. Carr is a GAFTA qualified arbitrator who can be contacted through his present employer, "TORC Grain and Feed Ltd.". *See Exhibit 1 to the Philippas Decl.* Additionally, attached to the Declaration of Mr. Philippas is an extract from the GAFTA Handbook showing Mr. Carr's qualifications. *See Exhibit 2 annexed to the Philippas Decl.* Mr. Carr is not an expert in maritime matters and is not a member of any maritime arbitration panels, such as LMAA (London Maritime Arbitrators Association) or the Baltic Exchange. The GAFTA Handbook lists Mr. Carr as a member of GAFTA Trade Diploma and a Member of the Chartered Institute of Arbitrators. As noted in the handbook, Mr. Carr is involved in commodity trading, specifically grains and oilseed products. The GAFTA Handbook does not identify Mr. Carr as an expert in maritime matters. *See Exhibit 2 to Philippas Decl.*

It is notable that LMAA arbitration is not specified in the sales contract. This further emphasizes that the sales contract was not maritime in nature. *See Aston Agro-Industrial Ag v. Star Grain Ltd.*, 2006 U.S. Dist. 91636 at *13, n.5 (S.D.N.Y. December 20, 2006)("It is also

noteworthy. . . that the contracts provided for arbitration before GAFTA, and not maritime arbitration, as would have been customary had the contracts truly been maritime in nature.")

On or about August 5, 2008, Jakil submitted its Claim Submissions to GAFTA. *A copy of Jakil's claim submission is annexed to the Philippas Decl. as Exhibit 3.* Jakil's claim is based solely on Agrimpex' alleged shipment of only 25,800 metric tons in total cargo. Jakil claims as its damages the difference between the market price of the cargo and the contractual price of the cargo. In support of its claim, Jakil presents evidence of the prevailing market rates for Sudanese durra feterita. *See Exhibit 3 to Philippas Decl.* Clearly, Jakil has not alleged a breach of any alleged maritime provisions of the sales contract, and has not alleged a maritime claim in the underlying GAFTA arbitration. Hence, its claim is not maritime as it arises solely from a sales contract. Here, the subject matter of the contracts between Jakil and Agrimpex is the purchase and sale of Sudanese durra feterita. *See Exhibits "1" through "5" annexed to the LeVasseur Decl.* Neither Sudanese durra feterita nor the purchase thereof is directly and intimately related to the operation of a vessel or its navigation. Moreover, Jakil does not allege how specifically this commodity sales contract is maritime in nature.

In sum, in the instant case a buyer of durra feterita (Jakil) is attempting to recover damages from the seller of durra feterita (Agrimpex) as there were problems with delivery. The fact that the delivery happened to take place on a ship is completely incidental to the purpose of the contract, namely, the sale of the Sudanese durra feterita.

As the sales contracts at issue are not directly and intimately related to the operation of a vessel and its navigation, they are not sufficiently maritime to come within maritime jurisdiction.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that this Court grant Defendant Agrimpex' motion to vacate the attachment.

Dated: New York, NY
August 26, 2008

The Defendant,
AGRIMPEX CO. LIMITED

By: Anne C. LeVasseur

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AFFIRMATION OF SERVICE

I hereby certify that on August 26, 2008, a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE MARITIME ATTACHMENT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

By: Anne C. LeVasseur
Anne C. LeVasseur

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHANGHAI SINOM IMPORT AND EXPORT,

Plaintiff,

v. 06 Civ. 4711

EXFIN (INDIA) MINERAL ORE CO.,
PVT. LTD.,

Defendant.

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October 5, 2006
4:30 p.m.

Before:

HON. GERARD E. LYNCH

District Judge

APPEARANCES

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CHARLES E. MURPHY

DeORCHIS WIENER & PARTNERS, LLP
Attorneys for Defendant
BY: JOHN ORZEL
SUBIR MAJUMDAR

(Case called)

(In open court)

MS. DAVIES: Good afternoon. Lauren Davies for the plaintiff. And this is Charles Murphy of our office.

THE COURT: Good afternoon.

MR. ORZEL: Good afternoon, your Honor. John Orzel from DeOrchis Wiener & Partners, for the defendant. With me is Mr. Subir Majumdar, who is Indian counsel for us.

THE COURT: OK. Welcome Mr. Majumdar, and good afternoon, Mr. Orzel.

All right. We are here on the defendant's application to vacate an order of maritime attachment. The essential argument of the defendant is that this is not a maritime contract and, therefore, there is no admiralty jurisdiction, and, therefore, the rules permitting the attachment have no application and indeed the case should be dismissed for lack of jurisdiction.

Do I have that right, Mr. Orzel?

MR. ORZEL: That is correct, your Honor.

THE COURT: OK. I have read the parties' submissions, and I have also read a number of the critical precedents that are cited. Let me see if I understand the facts correctly, Ms. Davies. This is a contract for the sale of iron ore from a company in India to your client which is a company in China.

MS. DAVIES: That's correct, your Honor.

THE COURT: OK. And the contract, which is in the record, has certain provisions that specifically relate to a requirement that the goods will be shipped by sea.

MS. DAVIES: That is correct.

THE COURT: OK. Is there actually something that explicitly says "And, by the way, you have to send this by water." I take it there is no question it would be sent by water. We are talking about tons of iron ore; it's not going to fly or go by truck or something.

MS. DAVIES: The provisions, specifically ten through 13, and several others, relate specifically to the nomination of a vessel.

THE COURT: They all assume. These provisions assume it's going to be by sea, but I just didn't see something that said that you have to ship by sea.

MS. DAVIES: I would presume that by nominating or requiring the nomination of a vessel it would need to be by water.

THE COURT: Yes. Whether there is such an explicit provision or not, it's clear that the contract contemplates transportation by sea.

And then there are all of these provisions that specifically relate to nominating a particular vessel, things like demurrage and lay time, and different conditions that would apply to such a shipment by sea.

Now, I take it the plaintiff does not contend that the defendant breached any of those specific maritime conditions.

MS. DAVIES: Actually, your Honor, we do. I mean not in terms of specifically breaching, say, clause 10 or clause 11, but these clauses taken together are maritime provisions for the delivery of the iron ore from India to China.

THE COURT: But it got to China. It didn't wash overboard somewhere along the way.

MS. DAVIES: No, it did not. But we did not receive the entirety of the cargo at the discharge port in China.

THE COURT: Right. But that's because -- I mean tell me if there is a dispute about this, but I thought it was undisputed that the iron ore got to China, actually got off the ship and then got seized by some other party due to some other litigation.

MS. DAVIES: Yes, that is correct. There is not a dispute to the seizure. Just to clarify that a bit, when the vessel arrived at the port in China, the day prior to the vessel's arrival a nonparty named the Red Horse had effected a maritime attachment against the cargo.

THE COURT: Ah, live by the sword and die by the sword.

MS. DAVIES: Yes.

THE COURT: But the basic breach of contract action is pretty simple: You bought something, you paid for it, and you

didn't get it, or you didn't get all of it in a timely way as required by the contract. Right?

MS. DAVIES: I would agree with that, yes.

THE COURT: And whatever the defendant failed to do -- which I think essentially is simply that they failed in the basic provision of delivering the goods to you -- they didn't fail to comply with any of those specifically maritime requirements in the contract.

MS. DAVIES: I would respectfully disagree on the same basis, because they did fail to deliver the cargo, and in a --

THE COURT: Well, I hear that, but that would have been true -- I mean suppose, I don't know, somebody else came along and offered them a higher price, and the defendant sold the iron ore that was destined for you to another company in India, and it never got on a boat at all, they just send you a cable saying, sorry, we found a better price, better luck next time, we're not sending anything. Right? That would have been a breach of this contract too, right?

MS. DAVIES: Yes, I agree.

THE COURT: And that wouldn't have had anything to do with boats.

MS. DAVIES: I agree, because that would have been before the maritime portion of this contract, meaning the ocean transportation for delivery had been effected.

THE COURT: But the ocean transportation has been

effected, right, successfully. It gets to Shanghi or wherever it's going.

MS. DAVIES: Yes, it does get there.

THE COURT: OK. And lastly, this is clearly not a contract between any kind of party and a vessel owner or transporter of goods of any sort. Right?

MS. DAVIES: Well, what do you mean by a transporter of goods?

THE COURT: Well, am I correct that there -- maybe you don't know from where your client sits -- but the defendant doesn't own any ships, I take it.

MS. DAVIES: That's correct.

THE COURT: And the contract contemplates that they're going to enter a contract with somebody who does own ships in order for that -- in order to charter a boat, to take the cargo to China.

MS. DAVIES: That is true, but what the defendant does do is they act as somebody who would have been a ship owner in a traditional charter party by setting forth the requirements that you see in the contract: The type of vessel that needs to be demurraged, lay time, all those provisions.

THE COURT: What is the commercial purpose of that? Is this something that matters? And, if so, to whom?

In other words, is there a reason why the purchaser in a contract of this kind cares about these various maritime

terms?

MS. DAVIES: My opinion would be that both parties in this instance want to see -- especially the buyer -- want to see the cargo arrive safely and in the condition in which it's supposed to be. This is iron ore, so the common issues with that would be salt water, rust, corrosion of the vessel. It could be improperly loaded, improperly stowed. The vessel could be of an improper type. So those types of things seem to be what they were contemplating.

THE COURT: Mr. Orzel, maybe you can give me a perspective on this. Isn't at least some part of this contract one in which your client undertakes a role similar to that of at least some party -- I'm not sure what kind of party -- in a typical maritime transaction? I'm not sure whether it's a broker or an MVOCC. Somebody out there is in the business of chartering boats and entering these specifications, and the seller in this contract undertakes that role, don't they?

MR. ORZEL: I don't believe so, your Honor. At best I think we undertake, or these provisions are prefatory to our entering into a maritime contract.

The provision such as the lay time, the dispatch, even the vessel itself, they all have commercial import. Lay time provisions, because the buyer is the one who would be responsible for paying for lay time. They want to know what that is beforehand, so that's why that type of provision would

be in the contract.

The provision about giving them the right to review the vessel before we enter into the charter party, it's because if the vessel is more than 20 years old, they probably couldn't get cargo insurance for it, and under the contract it's their obligation to provide the cargo insurance.

The risk of loss passed when we loaded the vessel.

THE COURT: The risk of loss passed when you loaded the vessel, meaning if -- well, I take it there is some dispute about that, isn't there?

MR. ORZEL: No, it's clause 17, which is very clear. Risk of loss passes when the cargo leaves our discharge chute at the load port. So if the vessel sank, it's their loss, not ours.

THE COURT: And they would have to go after the --

MR. ORZEL: Ship owner.

THE COURT: -- after the ship for that --

MR. ORZEL: Correct.

THE COURT: -- for that recovery.

MR. ORZEL: So at best this lays the groundwork for us entering into the charter party, which we did. But in and of itself it's not a contract of carriage.

THE COURT: Yes, and you then did enter into a contract of carriage with somebody.

MR. ORZEL: Correct.

THE COURT: And you also agree that that contract was successfully completed.

MR. ORZEL: Correct.

THE COURT: And the goods get offloaded, in fact.

MR. ORZEL: That is correct.

THE COURT: All right. And at that point there is other attachment.

MR. ORZEL: Right. And just as a point of clarity, it's the plaintiff's responsibility in China to discharge the vessel.

THE COURT: Right, that's provided specifically under the contract.

MR. ORZEL: Correct.

THE COURT: All right. I think I'm prepared to rule. The defendant moves to vacate an order of maritime attachment, arguing that admiralty jurisdiction does not exist in this case since the underlying contract that's the basis of plaintiff's claims is not a maritime contract.

It is undisputed that the contract is primarily a contract for the sale of goods, specifically iron ore, from an Indian company to another in China.

The contract, in addition to various provisions typical of such a sales contract, also includes maritime provisions requiring the ore implicitly to be shipped by sea and specifying certain requirements regarding the conditions

for such shipment.

It is clear, however, that the contract is not a contract for maritime transportation; rather, the contract contemplates that the defendant will enter such a contract with a suitable ship owner.

There is no allegation here that defendant breached the specifically maritime aspects of the contract. It provided for appropriate ship transportation in accordance with the terms of the contract, and, in fact, the shipment of ore was delivered intact to China as the contract required. However, it was not delivered to the plaintiff purchaser, because the ore was attached as part of an unrelated lawsuit between the defendant and another Chinese company. For present purposes there is no need to address the nature or merits of that dispute or the merits of plaintiff's claims of breach of contract.

Suffice to say, that plaintiff has sued because it did not receive the goods, or all of them, in a timely manner, and it seeks various items of damages for such nondelivery.

On this record, both common sense and long-established case law suggests that this is a nonmaritime dispute between a purchaser and seller over the alleged failure to deliver purchased goods. I note that that dispute has no connection to the United States whatsoever, and there is apparently no basis for *in personam* jurisdiction over the defendant in this court

or for subject matter jurisdiction in the federal courts on any nonadmiralty basis. This case is only here because of the liberal provisions for attachment and *in rem* jurisdiction in admiralty cases.

The Fifth Circuit's decision in *Lucky Gold Star v. Phibro Energy*, 958 F.2d 58 (1992), states the long-established law on this subject, noting that a contract for a land-based sale of goods is not maritime merely because the seller agrees to ship the goods by sea to the buyer. Citing its earlier decision in *Loredo Offshore Contractors v. Hunt Oil Company*, 754 F.2d 1223, 1231-32 (Fifth Circuit 1985), the court noted that "It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not without more bring nonmaritime obligations within the pale of admiralty law."

Our Court of Appeals in *Phypin Steel Company v. Asoma Corporation*, 215 F.3d 273, 277 (2d Cir. 2000), drew a similar distinction, noting that "Admiralty jurisdiction extends only to wholly maritime contracts or severable maritime portions of mixed contracts."

Contrary to plaintiff's argument, *Phypin* does not support its position. Although the mixed contract there did indeed permit admiralty jurisdiction, that was because the action there arose specifically under the bill of lading, which the court found to be a maritime contract in itself.

As the court noted, Phypin's *in rem* claim "arises

under and is based on their purported entitlement to the bill of lading" as opposed to the cargo itself. That is not so in this case.

The plaintiff argues, however, that these cases have been superseded by the Supreme Court's more recent decision in *Norfolk Southern Railroad v. Kirby*, 543 U.S. 12 (2004). It's true that the Supreme Court there rather expanded the notion of a maritime contract and declined to treat a contract specifying both land and sea shipment as composed of severable land-based and maritime components, but the contract in *Norfolk Southern* was dramatically different in nature from the one here.

In *Norfolk Southern* the court found the contract to be maritime in nature because its primary objective was to accomplish the transportation of goods by sea from Australia to the United States. The contract -- unlike the contract here -- was specifically a contract of carriage, and the fact that the last leg of the journey was to have been by rail did not undermine the fact that the principal objective of the contract was maritime commerce.

The reasons why the court took the approach that it did to the contract in *Norfolk Southern* are instructive and are highly distinguishable from any considerations applicable here.

As the Supreme Court noted, maritime commerce has evolved along with the nature of transportation. Given the container revolution, maritime transportation is often

inseparable from land-based aspects of transportation in a new era in which cargo owners can contract for transportation across oceans to inland destinations in a single transaction. I am here paraphrasing very closely the words of the Supreme Court which can be found at 543 U.S. 24-25.

These conditions and this change in the nature of maritime commerce critical to the decision in *Norfolk Southern* have no bearing here. What we have here is a contract of the sort perfectly familiar long before the advent of container ships and integrated transportation systems. The purchase of goods by a buyer in one country from a seller in another, with a proviso that the goods are to be sent by sea, and with some incidental provisions bearing on the nature of that shipment, the alleged breach here was a breach wholly of the sale of goods provisions of the contract, not of its incidental maritime aspects, or indeed, of any transportation aspect at all. There is thus no basis in this case for maritime jurisdiction.

Now, those are the reasons for my ruling, but I think it would be a blinking reality to ignore another factor about the case.

In recent years, maritime attachments in this District in particular, and distinct from just about everywhere else in the United States, have become a rather prominent heading of our jurisdiction. This stems from the Second Circuit's

decision in *Winter Storm Shipping*, 310 F.3d 263 (2d Cir. 2002), in which the Court of Appeals permitted the attachment of transient assets, essentially wire transfers, passing through New York City and through the banks and the New York clearinghouse, which essentially has resulted in a system in which disputes between parties all over the world tend to find their way here not so that the case can actually be litigated here but solely for the purpose of obtaining security via the maritime attachment provisions of Rule B of the admiralty rules.

And the Second Circuit recently applied Rule B in a rather literal manner that disapproved of the actions of some district court judges -- this one not included -- in trying to set additional limits or additional restrictions on the ability to obtain maritime attachments. And that decision, *Aqua Stoli*, it seems to me to press a continuation of the liberal use of maritime attachments in this District, though I do note that the opinion in *Aqua Stoli* contained a footnote, which loosely paraphrased says, my God, what have we done, and casts some doubt on whether *Winter Storm* was correctly decided. But it is decided, and we have to live with it.

This is relevant only for the following reasons: I note that in light of the decisions in *Winter Storm* and *Aqua Stoli*, we can expect efforts by plaintiffs, entirely legitimately, to try to obtain maritime attachments by

interpreting the admiralty jurisdiction of this court liberally. Were such efforts to be countenanced, we would have in effect the kind of perfect storm -- forgive me, the courts addressing admiralty cases always seem inclined to nautical puns -- but we have a kind of perfect storm in which the combination of expansive maritime attachments and expansive interpretations of admiralty jurisdiction would mean that just about any international dispute in any sort of commercial context all over the world, wherever anything came close to a boat, would result in the potential for filing attachments in this District.

Now, that would be great news for the New York bar, which is not something that in my family has ever been regarded as a negative, but it would be less good news for this court and less good news for the banks that would have to administer these attachments, and ultimately less good news for the orderly resolution of disputes around the world.

Now, none of that constitutes a reason for declining to find admiralty jurisdiction in a case where admiralty jurisdiction exists, and that's why I first made clear that in this case I believe that under the case law this is not properly viewed as a maritime case.

But in the event this decision is reviewed by the Second Circuit, I wanted them to be aware that I am aware of the realistic consequences here and of the reasons why there is

an incentive for plaintiffs to seek expansive interpretations of the admiralty jurisdiction.

I am convinced that none of this was in the mind of the Supreme Court justices who unanimously decided the *Norfolk Southern* case. In fact, it is clear that that court was quite admirably looking to the realities of modern commerce in a way that suggested that admiralty jurisdiction needs to be interpreted in keeping with the commercial realities of the Modern Age, and they had in mind the fact that we no longer have a system that can so readily be separated between maritime transportation and land-based transportation when goods are loaded into a container, put on a truck, taken to the port, the container is then put on a ship, the ship goes somewhere else, and the container is put on a railroad flat car for ultimate delivery, and all of this is arranged by a single contract of carriage.

I think that to say, as the Supreme Court did in that case, that where the contract of carriage includes going all the way from Australia to Atlanta or someplace by ship, and then a little rail journey at the end, to call that anything other than a maritime contract would be a mistake.

But here we don't have a defendant that undertook to be an integrated carrier, or a ship owner, or any kind of maritime party; we have essentially a basic land-based contract for the sale of goods. And unless all such contracts which

involve anything heavy enough that it's inevitably going to be shipped by sea are to be treated as admiralty contracts, with all of the consequences that that entails, I don't think that some of the expansive language in *Norfolk Southern* casting doubt on the traditional rule about severing maritime and nonmaritime aspects of contracts, I don't think that language should be interpreted broadly, lest the admiralty jurisdiction swallow up all other forms of commercial cases. So that's the ruling.

Now, Mr. Orzel, I want to get -- specifically the motion is a motion to vacate the attachment.

MR. ORZEL: Correct.

THE COURT: And that's been granted.

I take it that given the rationale, you are also implicitly or explicitly, you are now going to move to dismiss the action for lack of jurisdiction.

MR. ORZEL: Correct, your Honor.

THE COURT: OK. And I also assume then, Ms. Davies, that you have no problem with my dismissing the underlying action for lack of jurisdiction, which will put you in a position, if you choose, to pursue this further, to take this ruling directly to the Second Circuit and not worry about the -- I don't know if the vacation order in itself would be appealable.

MS. DAVIES: We have no problem with that, your Honor,

although we would respectfully request that you stay the release of the funds while plaintiff considers their options to appeal.

THE COURT: No, I'm not going to do that. I think this is a case where there is no jurisdiction, and, you know, if we're wrong you will get it back, because it seems like this company engages in enough transactions that if at some point it turns out that I'm wrong, you file a new attachment, or the attachment is reinstated, and unless they go bankrupt between now and then -- which nobody is suggesting is going to happen -- you will have new security once more.

All right. So the stay is denied. The order of attachment is vacated. The underlying action is dismissed for lack of jurisdiction. The plaintiff's motion to stay those rulings is denied, and I think we have done our day's work.

OK. Thank you very much.

Mr. Orzel, we will issue a written order, just sort of invoking the on-the-record opinion, and I guess you will get that tomorrow. OK?

MR. ORZEL: OK. Very good.

THE COURT: All right. Very good.

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NOBLE RESOURCES,

Plaintiff,

v. 08 CV 3876(LAP)

YUGTRANZITSERVIS and
SILVERSTONE,

Defendants.

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New York, N.Y.
July 23, 2008
9:45 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

TISDALE LAW OFFICES, LLC
Attorneys for Plaintiff
BY: CLAURISSE OROZCO

CHALOS & CO.
Attorneys for Defendants
BY: GEORGE M. CHALOS

(Case called; in open court)

THE COURT: Counsel have very graciously agreed to prepare their papers quickly so that the hearing required to be conducted quickly on a motion to vacate a maritime attachment could take place promptly. I am grateful to counsel for doing that.

Defendant argues first that the contract at issue is not subject to maritime jurisdiction. We all agree to the law which is that the threshold inquiry examines the subject matter of dispute as opposed to the underlying contract. To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the

business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction.

As the Court of Appeals acknowledged in FolksAmerica, Reinsurance Co. v. Cleanwater New York, Inc., 413 F.3d 307 (2d Cir. 2005) the court directed that the jurisdictional inquiry be focused upon whether the nature of the transaction was maritime and observed that the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.

Here, the contract itself makes clear that maritime transportation was integral to the agreement. For example, the

contract provided that Plaintiff Noble would purchase a cargo from YTS and the contract set out in great detail the conditions for transportation and delivery.

The contract set out in the portion under delivery the window of dates open for loading in the specified port, that portion of the contract also required that the vessel nominated by buyers was required to tender her notice of readiness at the designated port. It set out how the loading of the vessel was to be effected. It set out in great detail the type of vessel that would be acceptable, that is, "A self-trimming bulk carrier, single-decker vessel suitable for direct loading (wagon-board of the vessel)."

The Contract also provided that the vessel could be -- should be confirmed or rejected by sellers in writing and, in fact, here the sellers rejected the first three vessels that were nominated eventually accepting the Southgate.

The contract further set out the preadvise that buyers were to give the sellers of the vessel's ETA, name, flag, dimensions, hatches and hold dimensions and alike. It set out in detail the loading instructions, the loading rate, detailed the notice of readiness and the laytime and the demurrage, among other provisions. So the underlying contract certainly touched upon the business of maritime commerce.

In addition, the dispute between the parties also touches upon the maritime commerce. As set out in plaintiff's

claim submissions in the arbitration, and perhaps more importantly as reflected in the award, the dispute centered on two issues. First, the default by YTS in failing to provide a berth for the vessel after she had tendered her notice of readiness and refusal to load the vessel constituting a default under the contract. And, secondly, a request for wasted vessel costs, that is, the costs incurred by the vessel following tendering of her notice of readiness.

As set out in the award damages were awarded for both these items and indeed there was a lengthy discussion in Section 6 of the award about the wasted costs incurred on account of the vessel's lack of use because of defendant YTS's default. The wasted vessel expenses included bunkering costs, port and survey costs, and hire payments, all clearly within the maritime jurisdiction.

For all those reasons, I find that the contract and dispute at issue fall within the Court's maritime jurisdiction.

The question has also been presented as to whether or not the guarantee by Silverstone falls within the Court's

maritime jurisdiction. As the Court has set out recently in C Transport Panamax, Ltd. v. Kremikovtzi Trade, et al., 07 CR 893 (June 19, 2008 S.D.N.Y.) courts in this circuit and elsewhere have long held that an agreement to act as a surety on a maritime contract is not maritime in nature. They have recognized that the same is not true of an agreement to

guarantee the performance of a maritime contract.

See e.g. Compagnie Francaise, DE Navigational Avapeur v. Bonnase, 19 F.2d 777, 779 (2d Cir. 1927) (L. Hand, J).

Here the guarantee by Silverstone specifically states "The guarantor (Silverstone) irrevocably and unconditionally, A, as principal obligor guarantees to the Buyers the prompt performance by (YTS) of all its obligations under the Contract...." Accordingly, the guarantee at issue here based on longstanding Second Circuit law falls within the meaning of maritime contracts.

Finally, with respect to defendant's argument that the matter is not ripe, the arbitral award has ordered that the payment be made and it has not yet been paid. Accordingly, the matter is ripe with respect to the guarantor. In addition, it is most frequently the case that Rule B attachments are used to provide security for arbitral awards and that has been the use here. Accordingly, defendants' motion to vacate the attachment is denied.

THE COURT: Is there anything else today?

MR. CHALOS: Yes, your Honor, two points if I may.

THE COURT: Sir.

MR. CHALOS: We thank the Court for hearing us on an expedited basis. We would first off like to make an application to the Court to reduce the amount of security. On page 14 of the award, the panel clearly sets forth that the

plaintiff was awarded $3,362,400 and no more as the words of the panel. Here the amount of the order attachment is almost double that. It is significantly more.

THE COURT: What is the story with the interest, Mr. Chalos?

MR. CHALOS: According to the panel, it is 7.5 percent beginning August 16, 2007. That is only one year's worth of interest. Surely this can be resolved in the next, I would assume, six months or so with the upcoming appellate deadlines.

THE COURT: Has anyone done the calculation of the interest?

MS. OROZCO: I have, your Honor. But I would just like to speak on that point. The panel awards the amount less than we had sought in our application, but it also awards interest 7.5 percent from the date of the default until it is paid and it also awards costs of arbitrator, not legal costs.

We have attached to date as outlined in my declaration $4 million. It is paragraph 34 of my declaration at page 6. We have not calculated the interest out for a year. What we have done is calculated it out for three years, which is normally what we undertake in anticipating appeals and that sort of thing. If we allow for three years of interest, security for three years of interest, plus the costs of the Gafta arbitration, the security that we would be entitled to

would be $4,225,000.

So we are at this time undersecured by 200,000. However, if the Court wants us to reevaluate the interest, we would be willing to do so and then release the funds accordingly if that was a proper analysis.

THE COURT: Counsel.

MR. CHALOS: Those calculations are flawed. Those calculations are based on the principal claim of 3.9 million. That is not what the panel awarded. 7.5 percent on the $3.3 million award is about, 21 to $210,000.

MS. OROZCO: I actually calculated the three-year interest on the amount awarded by the arbitrators, which was $3,362,400. And the interest from August 15th, 2007 through August 15th, 2010 is $840,000.

MR. CHALOS: I submit through 2010 is a bit long. I can certainly understand maybe two years, but not three.

Also, seeing as they are already secured from the guarantor's EFTs, I renew my application and dismiss the matter against YTS. They are secured or they are not secured. They have it already attached. There is no in rem quasi jurisdiction over the party whose funds who haven't been attached.

THE COURT: I don't hear counsel going out and seeking further attachments here.

MR. CHALOS: But they would, though. That is the point if they sought to move money. In fact, in the papers

that counsel submitted last night, they said exactly that they would do that. If they wound up -- U.S. dollar transfers on behalf of Yugtranszitservis came through New York, they would catch that and release monies belonging to the guarantor.

THE COURT: What do you say to that, counsel?

MS. OROZCO: Was that was a statement that we made. That statement as made with respect to the application of the New York CPLR in that case, which we didn't address and we say we are not applied. We actually have stopped serving the writ of attachment in this case and we are no longing serving on any of the defendants.

THE COURT: First, I decline to reduce the amount.

Second, obviously counsel knows that plaintiff may not be oversecured. If, Mr. Chalos, you find that plaintiff is attaching more than the four million two number -- is that the total number? Please remind me.

MS. OROZCO: Yes. The total number is comprised of $3,362,400 of principal pursuant to the arbitration award issued on July 4th, 2008, with the rate of interest calculated at 7.5 percent which is also the rate awarded for three years from August 15th, 2007 through August 15th, 2010. The interest on that amount is $840,501.

In addition, the arbitration award also allowed costs, Gafta costs, to the plaintiff and the Gafta costs incurred were 23,000 U.S. dollars. So the total security we would be

entitled to or we would be seeking is $4,225,901.

THE COURT: To the extent, Mr. Chalos, counsel attaches more than that, you let me know.

MR. CHALOS: Thank you, your Honor.

Finally, your Honor, we would like to ask the Court to certify this for immediate appeal to the Second Circuit.

THE COURT: I will take a letter on that.

How is this a complex or novel issue?

MR. CHALOS: Well, it is a novel issue in the sense that the Court has for the first time found a Gafta contract to be within the meaning of a maritime contract and a maritime claim under Rule B. It stands starkly in contrast to Judge Daniels' decision as to Aston Agro as well as Judge Sullivan, I am not sure about that, in the Tan Shan case. These exact arguments were presented there with a 180-degree different result and I do believe that if we can bring this to a head Second Circuit level promptly that would help provide some clarity on these types of issues.

THE COURT: The law is not in doubt. It is the application, right?

MR. CHALOS: Well, I think the law is in doubt in a sense that our position is that the Court needs to look to the primarily objective of the contract. Our argument has been that the primary objective of the contract is one of sale and purchase.

THE COURT: I didn't see any of the Second Circuit cases talking about the primary objective of the contract.

MR. CHALOS: Well, I think we set out the argument based on the precedent of Judge Daniels' decision, which can be found for the Court's reference on page 3 of the Aston Agro decision where he writes, In this case the contracts are not maritime contracts because they are primary objective was not the transportation of goods by sea. Instead, their primary objective was undoubtedly the sale of wheat. That the wheat was transported on a ship does not make the contracts maritime contracts anymore than it would make them aviation contracts had the wheat been shipped via airplane. Nor would the contracts between a seller and shipper -- that is true here. the judge in that matter goes on to write, Nor can maritime jurisdiction be exercised under an exception to the general rule that maritime jurisdiction "Arises only when the subject matter of the contract is purely or wholly maritime in nature. Under the first exception, federal court can exercise --

THE COURT: Counsel, do you want this taken down? If you do, you better read so the court reporter can take it down.

MR. CHALOS: The Court has it before it.

THE COURT: So you don't need to read it.

MS. OROZCO: May I respond?

THE COURT: Yes, ma'am.

MS. OROZCO: The key to the quotes by defendant from

the Ashon Agro case is the first line where it says, "In this case." and further or in the quote Judge Daniels says that based on the facts of that particular case they are not within the maritime jurisdiction.

I would just like to point out that the Exxon case,

500 U.S. 603, 612 reminds us -- this is the U.S. Supreme Court -- reminds us that courts are required to look to the subject matter of the relevant contract. And in this case the relevant contract, the Noble YTS contract, provides maritime jurisdiction.

MR. CHALOS: Your Honor, this is the shifting sands that I have been arguing again. The Court is required to look to the nature of the contract, not the dispute. Twenty minutes ago counsel was arguing the Court needs to look to the dispute and I rejected that. The contract is a sale and purchase contract, not a maritime contract. It is not maritime contract with third parties. We had nothing do with it. My clients had nothing to do with it. That is the dispute here. If you look to the nature and substance of the contract, we are selling and they are buying. Full stop. It is the sale and purchase contract.

In fact, your Honor, that was precisely what was addressed by Judge Daniels. He writes here invoking the first exception, Aston contends that maritime jurisdiction exists because the particular claims at issue involve only the

maritime portions of the contracts, and it was rejected, which is precisely the argument presented by plaintiff. Our opposition is precisely the argument adopted by Judge Daniels.

THE COURT: The Court denies the request for certification under 28, U.S.C., Section 1292(b). The controlling law is not at all at issue in this case. Everyone agrees on the cases that should be looked to for guidance. The only dispute is the application of those cases to the facts of this case as opposed to the facts of other cases. Accordingly certification for immediate appeal is denied.

Anything else, counsel?

MR. CHALOS: Nothing further, your Honor.

THE COURT: Thank you, ladies and gentlemen. Thank you for your excellent arguments.

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